First Amendment Issues in our Schools: Political Speech, Symbolic Speech & Citizen Speech

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Introduction

Not since the time of the Vietnam War have issues involving First Amendment Free Speech been so prominent in our schools. These issues have been present at board of education meetings, at student on-campus protests, in clothes worn by students, as well as in displays placed in school buildings.

Curricular content has also been a subject of conflicting viewpoints among parents, faculty , administration and school boards.

This presentation will cover recent legal developments which inform policy and day-to-day responses to 1st Amendment issues in the school setting.

First Amendment to the U.S. Constitution

- *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances."*

NY State Constitutional Right to Free Speech

- *"Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."* Article 1, §8.

What is Speech?

Verbal

Written

Symbolic

Conduct

Intended to convey a "particularized message" likely to be understood by viewers. *Texas v Johnson*, 491 U.S. 397, 404 (1989)


Student On-Campus
Speech

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

- Student speech rights are not shed at the schoolhouse gate but may be reasonably restricted as to time, place and manner.
- The speech was "symbolic" – wearing a black arm band to protest the Vietnam War.
- Speech protected *so* long as it would not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others".

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)

- High school student was suspended for giving a nominating speech for a class officer that was laced with sexual innuendo.
- The Court did not base its decision on the "material disruption" standard of *Tinker*.
- Rather, the Court held that the use of "vulgar and lewd" or "plainly offensive" speech in a school-sponsored activity could be restricted.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

- The school-sponsored newspaper was subject to editing (censorship) by the administration (*e.g.*, grammar, accuracy, balance in reporting and age-appropriate subject matter).
- Not a violation of First Amendment for administration to exercise control over content of speech in school sponsored activity based on legitimate pedagogical concerns.

Obscenity expressed on clothing worn in school

Appeal of Parsons,37 Ed. Dept. Rep. 465, Decision No. 12,954(1998)

A student was disciplined for wearing a T-Shirt stating that it featured “the patented BIG JOHNSON SAFETY guaranteed to prevent premature firing" and "YOU NEVER SHOOT BLANKS WHEN YOU'RE PACKIN' A BIG JOHNSON".

In upholding the discipline, the Commissioner cited to the Supreme Court decision in Bethel Sch. Dist. No. 403 v. Fraser, 487 U.S. 675 (1986), noting that the right of free speech is not absolute and ". . . must be balanced against society's countervailing interest in teaching students the boundaries of socially acceptable behavior“, recognizing the role of the public schools to inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation (*Id*. at 681).

Guiles v. Marineau, 461 F.3d 320 (2d. Cir. 2006)

- A student in a Connecticut high school wore a T-Shirt which referred to President George W. Bush as a chickenhawk president, a cocaine addict, wearing a combat helmet, a world domination tour, being an AWOL draft dodger and a lying drunk driver. There were depictions of oil rigs and lines of cocaine.
- The Second Circuit Federal Court of Appeals found the t-shirt content to be protected speech; not materially disruptive to the educative environment. ("The Tinker Test") [cont'd]

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) [cont'd]

The t-shirt did not constitute obscene speech which would not be entitled to First Amendment protection under the Court's ruling in **Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)** and did not bear the imprimatur of the District, as would an article in the school sponsored newspaper under the Court's ruling in **Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).**

The student's political speech was subject to analysis under the Tinker Test alone, based upon the speech content printed on the t-shirt.

UNDERSTANDING POLITICAL SPEECH

Examples of Political Speech

- Handouts and petitions
- Posting signs and placards
- Speeches
- T-Shirts, Buttons & Pins
- Standing, sitting, saluting or choosing not to salute

Morse v. Frederick, 551 U.S. 393 (2007)

- Outside school, during school sponsored event, a student held up a sign saying, “Bong hits for Jesus”. Student was suspended.
- Court held sign was not plainly offensive or school sponsored, but *Tinker* standard did not apply.
- Because of the special characteristics of the school environment, speech advocating for use of illegal drugs could be restricted.

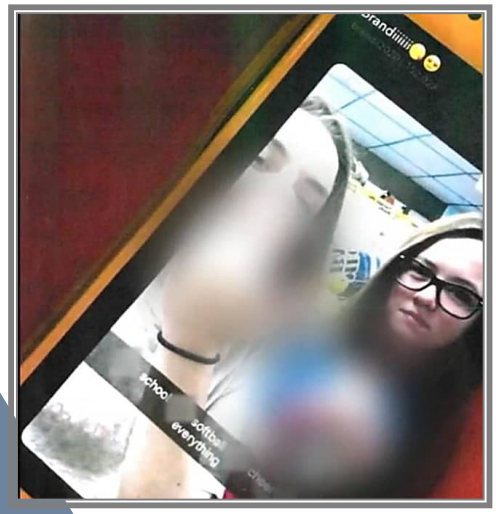
On-Campus Speech which Threatens

The Second Circuit Federal Court of Appeals shows little tolerance for on-campus threats:

In *Cuff v. Valley Central CSD,* 677 F.3d 109 (2d Cir. 2012) the Court upheld the suspension of a fifth grade student for six days who drew a crayon picture of an astronaut who "wants to blow up the school with all the teachers in it" the year after he'd drawn a picture of "a big wind that destroyed every school in America" killing all the adults but leaving all the children alive. Not accepting the excuse that the student was joking, the Court applied the Tinker/Wisniewski Test of foreseeable disruption.

Student Off-Campus Speech

B.L. v. Mahanoy Area Sch. Dist., 594 U.S. 180 (2021)



- On a Saturday, while at a local store with friends, Brandi was upset about not making the varsity cheerleading squad (she was again relegated to JV) and posted a photo to her Snapchat story.
- "F-ck school f-ck softball f-ck cheer f-ck everything," with a picture of her and a friend putting up their middle fingers.
- Students approached the coaches visibly upset about the snapchats and the coaches suspended Brandi for a year – stating her actions violated the team rules.
- Student won on First Amendment grounds.

B.L. v. Mahanoy Area Sch. Dist., 594 U.S. 180 (2021)

Although the Supreme Court refused to create a bright line rule regarding the regulation of off-campus speech, they did give important guidance as to what may not be protected under the First Amendment.

B.L. v. Mahanoy Area Sch. Dist., 594 U.S. 180 (2021) [cont.]

According to the Supreme Court, while public schools have "diminished authority" to regulate student's off-campus speech, schools retain significant interests in addressing off-campus student speech in circumstances of:

- Serious or severe bullying or harassment targeting particular individuals;

- Threats aimed at teachers or other students;

- The failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and

-Breaches of school security devices, including material maintained within school computers

Off- Campus Speech and the Mahanoy Standards

The court cautioned school authorities regarding attempts to restrict off-campus student speech by noting these considerations:

Features of off-campus speech that weaken schools' ability to regulate it: (1) parents are in charge off-campus and schools rarely act *in loco parentis* when students are not engaged in a school activity; (2) courts should be skeptical of 24/7/365 regulation of student speech, especially as schools have a "heavy burden" to justify intervention in off-campus political/religious speech"; and

(3) as "nurseries of democracy," schools have an interest in protecting students' expression of unpopular ideas, especially off-campus."

Reconciling Mahanoy and DASA Regarding Off-Campus Speech

Under DASA

"harassment or bullying.... that occurs off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property." 8 NYCRR §100.2(kk)

Discipline which involves Off-Campus Speech actionable under DASA may need to be considered in light of the Mahanoy Decision.

Would Doninger be decided the same way after Mahanoy?

Insolent Off - Campus Speech.

Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) – A student was prohibited from running for class office based upon what she wrote on a blog post from her home during non-school hours.

The student referred to school administration as “douchebags” and urged students to “piss off” the administration because they cancelled a school event –JAMfest.

The court stated that: “*The question is not whether there has been an actual disruption, but whether school officials ‘might reasonably portend disruption from the student expression at issue.’*”

Here a privilege was withheld, the court would not opine upon a suspension for such conduct.

What Standard of "Threat" Should be Applied Post-Mahanoy?

- Off- Campus Speech Which Threatens.
  - *Wisniewski v. Board of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) - from his home computer a student sent through an instant messaging program to other students an icon showing a person being shot, with the notation: "Kill Mr. Vandermolen" (a teacher at the student's school).
  - Even though the conduct originated off-campus, it was subject to discipline because it *reasonably posed a foreseeable risk that it would materially and substantially cause a disruption in the school*.
  - The *Wisniewski* test for sanctionable off-campus speech which threatens appears to be consistent with *Mahanoy*.

What standard of "Threat" should be applied after Mahanoy?

- *R.S. v. Valley Central School District*, 24 CV 492 (KMK) (2024)

  A New York School District issued an out-of-school suspension to a student who posted on an off-campus private group chat on Discord a threat against another student and a faculty member – words to the effect of I want to come back into school, riot and burn the school down, as well as beat the sh-- out of Student A and Faculty Member A.

Speech at School Board Meetings

Content Based Restrictions & Viewpoint Neutrality

- Content-based restrictions must be, “reasonable in light of the purpose served by the forum” and “viewpoint neutral.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).
- Blanket exclusions on certain types of speech are permissible in the limited open forum, but once the government allows expressive activities of a certain genre, it may not selectively deny access for other activities of the same genre. *Hotel, cited supra*.
- **All content-based restrictions must be viewpoint neutral, not only on their face, but also, as applied, meaning they must be enforced consistently.**

Restricting Speech at Board of Education Meetings

When speakers are allowed to commend faculty members during public speaking at board meetings and negative comments are disallowed, it may violate the 1st amendment rights of the speakers with negative comments.

In *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988) the meeting chair ruled a member of the public who was expressing a negative opinion regarding who should be a successor chair to be out of order, disallowing further speaking by that person. In the federal litigation under the federal civil rights statute (42 U.S.C. §1983) which ensued, the chair was found not to be entitled to *qualified good faith immunity*. Another trustee who was sued for not actively insisting that the chair allow the plaintiff to speak was held to be entitled to that immunity status.

Restricting Speech at Board of Education Meetings

School Boards should review their policies and by-laws regarding public participation at board of education meetings to determine:

- Is there a time restriction per speaker? (*e.g.*, 3 or 5 minutes)
- Is there a total number of minutes for public speakers on agenda items? Non-agenda items? (*e.g.*, 30 minutes)
- Is there a protocol for extending time based upon a motion voted upon at the meeting?
- Are speakers being strictly held to the time frames?
- Are there sign-up rules in place for those who will be permitted to speak?
- Is there a protocol for brief recesses to restore order if there is an unruly speaker?

Prohibited Speech

Speakers may not use epithets, slurs, lewd and obscene speech, profanity, libelous speech, threats, or "fighting" words or gestures.

- *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942): The U.S. Supreme Court held, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

- *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940): "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution…."

Tyler v. City of Kingston, 74 F.4th 57 (2d Cir. 2023).

- Plaintiffs (political and community activists) brought a *First Amendment* challenge to the City of Kingston's prohibition against bringing signs and posters into public meetings of the Common Council held at Kingston City Hall.
- The City moved to dismiss, arguing that Common Council meetings are limited public fora in which the City is permitted to reasonably restrict speech that undermines the purpose for which the forum had been opened.
- The district court granted the City's motion, noting that government entities are permitted to regulate the manner in which the public participates in limited public fora. The district court concluded that Plaintiffs had not adequately alleged that the City's sign prohibition was unreasonable in light of the potential disruption or distraction that signs at Common Council meetings might pose.
- The 2nd Circuit affirmed the district court's decision.

Employee On-Campus Speech

Employee First Amendment Free Speech

The test for determining whether or not public employee speech has First Amendment protection changed fundamentally with the U.S. Supreme Court Ruling in ***Garcetti v. Ceballos*, 547 U.S. 410 (2006).** Prior to *Garcetti*, first, a determination would be made as to whether or not the speech would be on a matter of public interest, Then, if so, unless it was unduly disruptive of the work place, it could not subject the employee to disciplinary action. *Connick v. Myers*, 461 U.S. 138 (1983).

In *Garcetti*, the first aspect of analysis is whether or not the speech may be viewed as "*citizen speech*".

Employee First Amendment Free Speech

The *Garcetti* facts: A deputy district attorney who issued an internal memo explaining that a case shouldn't be pursued because a police officer's affidavit in support of a warrant was factually inaccurate. The attorney was transferred and denied a promotion.

- The Supreme Court held that public employees speak as employees and not citizens when they make statements pursuant to their official duties.
- If the speech is related to performing job duties (whether or not in a job description) it does **not** enjoy 1st Amendment protection.

Employee First Amendment Free Speech

The Second Circuit Applies *Garcetti* in the School Setting:

Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y., 593 F.3d 196 (2d Cir. 2010) – a teacher's complaint and filing of a grievance about the failure of administration to suspend a student was in furtherance of a "core duty" of the teacher and not citizen speech that would be 1st Amendment protected.

Massaro v. N.Y.C. Dept. of Educ., 481 Fed. Appx. 653 (2d Cir. 2012) - a teacher complained of unsanitary working conditions in which she contracted scabies, for which she submitted an injury/accident report. The court concluded that her speech was employee speech and not citizen speech. When one of her classes was changed along with her schedule, there was no 1st Amendment protection against such employment action.

Employee First Amendment Free Speech

Under what circumstances would public employee speech qualify as "Citizen Speech"

- *Matthews v. City of New York,* 779 F.3d 167 (2d Cir. 2015)
  - A police officer reported to supervisor that the precinct's policy of implementing a quota system for arrests, summonses and stops was contrary to the precinct's mission to improve community relations
  - *The report was made through the same channels as citizen complaints*
  - This reporting was not within the officer's job duties
  - First Amendment Protected

Employee First Amendment Free Speech

In *Appeal of Stephenson*, Decision No. 16, 329 (2012) a probationary teacher was terminated for speaking to students in the class of another social studies teacher about the integrity of the school and the removal of their teacher.

The Commissioner denied that the speech made in the classroom of the school in which she worked constituted citizen speech. Citing to *Garcetti*, and finding the speech not to be 1st Amendment protected, the termination decision was not overturned and the Commissioner noted that the District had the unfettered right to terminate the probationary teacher.

Employee First Amendment Free Speech

Restriction on Employee Religious Speech at work:

Teachers' use of religious references in his delivery of instruction to students is not protected. First Amendment speech and failure to adhere to directives to cease and desist would constitute insubordinate conduct subject to disciplinary action.

Marchi v. Board of Coop. Educ. Servs., 173 F.3d 469 (2d Cir. 1999)

Employee First Amendment Free Speech

Wearing Personal Religious Symbols and Dress

The wearing of religious attire by teachers while in school or otherwise performing job duties may be prohibited in the public schools because it violates the Establishment Clause ban on endorsing religion. The restriction was against clothing that communicates adherence to a religion but not jewelry with an ambiguous message (e.g.; cross or Star of David) *U.S. .v. Bd. of Educ. for Sch. Dist. of Philadelphia,* 911 F.2d 882 (3d Cir. 1990).

There is no Second Circuit Case on point

POLITICAL SPEECH/BUTTONS

- In the school setting, courts have found that "governing boards of public schools are constitutionally permitted, within reason, to regulate the speech of teachers in the classroom for legitimate pedagogical reasons." *Weingarten v. Bd. of Educ. of City Sch. Dist. of City of New York*, 680 F. Supp. 2d 595, 600 (S.D.N.Y. 2010).
- Courts have held that a school district has a legitimate pedagogical concern in maintaining the neutrality of the school in matters of politics. *See Weingarten v. Bd. of Educ. of City Sch. Dist. of City of New York*, 591 F. Supp. 2d 511, 519 (S.D.N.Y. 2008) (court held that school districts have a "legitimate pedagogical concern with the maintenance of neutrality.").
- For example, with regard to school districts prohibiting its teachers from wearing political buttons, a New York Court found that such a prohibition is "constitutional so long as [the school] acted in good faith and reasonably could have regarded the button ban as furthering their legitimate pedagogical concerns." *Weingarten*, 680 F. Supp. 2d at 600.

Weingarten v. Bd. of Educ. of City Sch. Dist. of City of New York, 680 F. Supp. 2d 595, 600 (S.D.N.Y. 2010)

- The plaintiffs are the president of the teachers' union and three New York City public school teachers.
- The defendants are the NYC Department of Education ("DOE") and the New York City School Chancellor.
- The plaintiffs argue that a regulation barring teachers from wearing political campaign buttons (for all candidates) in DOE buildings violates their rights under the First Amendment and the New York State Constitution.
- The BOE advised teachers to comply with the regulation in light of the 2008 presidential election.
- The plaintiffs claim that the regulation violates their First Amendment rights by prohibiting them from wearing political campaign buttons, posting candidate political materials, and placing candidate-related political materials in staff mailboxes.

Weingarten v. Bd. of Educ. of City Sch. Dist. of City of New York, 680 F. Supp. 2d 595, 600 (S.D.N.Y. 2010) (Continued)

New York City School Chancellor Joel Klein stated that displays of political partisanship by teachers in schools are inconsistent with the educational mission and may improperly influence children.

The Court granted the DOE'S motion for summary judgment, finding that the regulation is constitutional as long as the defendants acted in good faith and reasonably could have regarded the button ban as furthering their legitimate pedagogical concerns.

Kennedy v. Bremerton School District, 597 U.S. 507 (2022)

- U.S. Supreme Court found in favor of a school employee, who lost his job as a High School football coach, after he knelt at midfield after games to offer a quiet personal prayer.

- Court held that the school district burdened the employee's rights under the Free Exercise Clause of the First Amendment by suspending him for his decision to persist in praying quietly at midfield; that the employee engaged in private speech, not government speech attributable to the school district, when he uttered prayers quietly at midfield without his players; that the school district's burdening of the employee's rights under the Free Exercise Clause and Free Speech Clause could not be justified on the ground that his suspension was essential to avoid an Establishment Clause violation; and the employee's private religious exercise was not impermissible government coercion of students to pray.

Note - On May 15, 2023, USDOE issued updated guidance on prayer in schools https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html